IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

SA.No. 827 of 1994()

AS.46/1988 of ADDL.SUB COURT,ATTINGAL
OS.115/1985 of MUNSIFF COURT,VARKALA
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APPELLANT/RESPONDENT/DEFENDANT:

LEKSHMI AMMA RADHAMMA WRONGLY NAMED IN THE JUDGMENT IN APPEAL AS LEKSHMI AMMA PACHAMMA, SREEKRISHNA VILASAM PUTHEN VEEDU, VETTIYARA, NAVAIKULAM

BY ADV. SRI.G.UNNIKRISHNON

RESPONDENT/APPELLANT/PLAINTIFF:

PACHI AMMA SAVITHRI AMMA, PLAVILA PUTHEN VEEDU, VETTIYARA, NAVAIKULAM.

BY ADV. SRI.N.GOVINDAN NAIR
SRI.P.PARAMESWARAN NAIR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/11/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 827 OF 1994

Dated 14th November 2007

J U D G M E N T

Defendant in O.S.115/1985 on the file of Munsiff court, Varkala is the appellant. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for redemption of Ext.A1 mortgage and for recovery of possession of the plaint schedule property. Plaint schedule property is 14 cents in survey No.4260 of Navayikulam village. Admittedly the property originally belonged to Narayaniyamma alias Kochappi Amma. As per the registered mortgage deed No.1662/1953 Kochappi Amma created mortgage for Rs.150/-. Mortgagee assigned the mortgage right in favour of Kurumbankonnan as per assignment deed No.1395/1954. Subsequently mortgagor Narayani Amma @ Kochappi Amma executed Ext.A1 mortgage on 26/5/1955 after recovery Rs.225/- from the assignee mortgagee Kurumbankonnan. The mortgage money of Rs.150/- was adjusted towards the earlier mortgage of 1953 and Rs.75/- was additionaly obtained by the mortgagor.

Subsequently Narayani Amma A Kochappi Amma executed Ext.A2 settlement deed dated 2/11/1955 in favour of her children whereunder property covered under Ext.A1 was set apart to the share of Challappan Pilla, her son. Under Ext.A2 other properties were set apart to Damodaran Pilla the other son. Plaintiffs are legal heirs of Chellappan Pilla. Appellant is the wife of Damodaran Pilla. Case of plaintiffs was that original mortgage ceased to exist on creation of Ext.A1 mortgage and as right of equity of redemption devolved on plaintiffs under Ext.A2, they are entitled to redeem Ext.A1 mortgage. Suit was instituted for redemption and recovery of possession. Appellant resisted the suit contending that suit for redemption of Ext.A1 mortgage is not maintainable without redeeming the original mortgage of 1953. Contending that it did not ceased to exist as claimed by plaintiffs it was also contended that subsequent to Ext.A1 mortgage mortgagee Kurumbankonnan transferred the mortgage right in favour of Sukumarakurup who in turn released the mortgage right in favour of mortgager Kochappi Amma and her son Damodapa Pilla and Ext.A1 mortgage has already been redeemed under Ext.B2 release deed dated 28/10/1968 and under Ext.B1 sale deed appellant obtained the right from Damodara Pilla and therefore suit for redemption is not maintainable. Learned Munsiff on the

evidence of PW1, Dws.1 and 2, Exts.A1 to A4, B1 to B3 and C1 found that Ext.A2 though termed as settlement deed is in effect a Will and Will come into effect only on the death of Kochappi Amma and under Ext.B2 the mortgage right was got released and so suit for redemption is not maintainable. Plaintiffs challenged the decree and judgment before Sub court, Attingal in A.S.No.46/1988. Learned Sub Judge on re-appreciation of evidence found that Ext.A2 is not a Will but a settlement deed which was acted and accepted and under Ext.A2 predecessor of plaintiffs obtained right on equity of redemption. It was also found that suit is filed for redemption within a period of 30 years and therefore suit is not barred by limitation. Learned Sub Judge allowed the appeal and granted a decree for redemption on deposit of value of improvements of Rs.6,925/- and Rs.225/- the mortgage money. It is being challenged in the appeal. Though appellant has formulated several substantial questions of law in the appeal memorandum this court admitted the appeal only on the following substantial question of law.

> What are the legal consequence flowing from Ext.B2 release of suit mortgage obtained by Ext.A1 mortgagor after she executed Ext.A2 and exclusive possession of

the property with Damodara Pilla from 1971 after the death of Kochappi Amma.

2. Learned counsel appearing for appellant was heard. There was no representation for respondents.

3. Argument of learned counsel is that under Ext.A2 no right in presumption was transferred in favour of Chellappan Pilla in respect of plaint schedule property as liability to pay the tax and right to enjoy the property during the life time of Kochappi Amma was reserved with her and therefore Kochappi Amma was entitled to redeem the mortgage and under Ext.B2 Sukumara Kurup released his mortgage right in favour of Kochappi Amma and her son and so suit for redemption will not lie as the mortgage had already stood redeemed. It was also argued that even if Ext.A2 is taken as a valid settlement deed, under Ext.A2 Kochappi Amma, the mortgagor has a right to enjoy the property during her life time and being a life interest holder she has interest in the property as provided under Section 91 of Transfer of Property Act and she is entitled to redeem the mortgage and therefore under Ext.B2 mortgage right was released and a subsequent suit for redemption of that mortgage will not lie and Ext.B2 cannot be interpreted as an assignment of the mortgage right and it can only be a release of the mortgage right.

4. Ext.A2 is a settlement deed executed jointly by Kochappi Amma and her five children. Admittedly, the property originally belonged to Kochappi Amma and her children by birth, did not have any right. They obtained right over the property only by virtue of Ext.A2 settlement deed. Therefore Ext.A2 can only be treated as a gift. Question is whether under Ext.A2 title of Kochappi Amma in the plaint schedule property was divested and vested on Chellappan Pilla and if not whether Kochappi Amma continued to be the owner of the property in which case she is competent to redeem the mortgage by obtaining release of mortgage right from Sukumara Kurup. A reading of Ext.A2 establish that title which originally vested with Kochappi Amma was divested and vested on Chellappan Pilla on execution of Ext.A2. What was left with Kochappi Amma after the execution of Ext.A2 was only the right to reside in the building and to enjoy the property apart from the liability to pay tax over the properties. At the same time, Ext.A2 also enables the children including Chellappan Pilla to whom properties were settled to get the property transferred in their name and effect mutation and also pay tax thereafter. Therefore, as rightly found by first appellate court, Ext.A2 is a valid deed and cannot be interpreted as a Will as was found by the trial court. If

that be so, under Ext.A2 Chellappan Pilla obtained title to the plaint schedule property, except the right to enjoy the property reserved with Kochappi Amma.

5. Argument of learned counsel is that even in that case as Ext.A2 provides a life interest to Kochappi Amma that interest is sufficient to redeem the mortgage as provided under Section 91 of Transfer of Property Act. Section 91 of Transfer of Property Act provides that besides the mortgagor any of the persons provided under clauses a, b or c are entitled to redeem the mortgage or institute a suit for redemption of the mortgaged property. Under clause (a) any person other than mortgagee of the interest sought to be redeemed, who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same is entitled to redeem the mortgage. True, under Section 91 a person having "any interest upon the property is entitled to redeem the mortgage." If that be so, even a life interest holder is entitled to redeem mortgage. But the question is whether on the facts proved Kochappi Amma was entitled to redeem the mortgage.

6. Ext.A2 is not in respect of plaint schedule property alone. But other properties are also included.

Even according to appellant, plaint schedule property was outstanding in the possession of the mortgagee from 1953 onwards. Therefore, on the date of Ext.A2 the mortgaged property was not in the possession of Kochappi Amma. Therefore, even though Ext.A2 provides that Kochappi Amma has a right to enjoy the property during her life time, she could not have enjoyed the property as it was outstanding in the possession of the mortgagee Kurumbankonnan and subsequently assignee mortgagee Sukumara Kurup. If that be the case, though Ext.A2 provides a life interest to Kochappi Amma it cannot be operative in respect of the plaint schedule property as she was not in possession of the property. Hence she was not entitled to redeem mortgage on the date of Ext.B2, as by that time equity of redemption was transferred to her son Chellappan Pilla under Ext.A2. If that be so, Ext.B2 cannot be taken as a release of the mortgage right. As deposed by DW2 Damodaran Pilla son of Kochappi Amma, Ext.B2 was obtained by him. According to DW2 he was asked to obtain the property from mortgagee Sukumara Kurup. It is clear from the evidence of DW2 that he obtained Ext.B2 though it was taken in the name of Kochappi Amma also. Ext.B2 though termed as a release deed, it could only be taken as an assignment of the mortgage right of Sukumara Kurup the

assignee mortgagee even though it was in the name of Kochappi Amma also. But on that date the mortgagor has right of equity of redemption available with Kochappi Amma was already transferred to Chellappan Pilla. Though life interest was reserved under Ext.A2 to Kochappi Amma as the property was outstanding in the possession of the mortgagee on the strength of that life interest she is not entitled to redeem mortgage as that interest cannot be the interest provided under Section 91 of Transfer of Property Act. If that be so, as rightly found by courts below respondent is entitled to the decree for redemption granted by courts below.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.827 OF 1994

14th November 2007

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